Strong Force (M) Sdn Bhd v Khoo Soon Lee Realty Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22C-32–09 OF 2020
WONG KIAN KHEONG J
4 JUNE 2023

Contract — Breach — No payment for work done — Defendant appointed plaintiff to construct 'Post-Tensioning Slab System' pursuant to letter of award — Delay in completion of works by plaintiff — Defendant terminated letter of award — Whether delay in completion of work attributable to plaintiff — Whether defendant ought to have allowed plaintiff's applications for extension of time to complete works — Whether defendant could counterclaim for liquidated damages — Whether defendant's termination of letter of award was valid — Whether plaintiff could rely on s 25(n) of the Construction Industry Payment and Adjudication Act 2012 to claim for progress claim — Whether defendant breached letter of award by non-payment of progress claim — Whether letter of award required defendant to initiate joint valuation of plaintiff's works upon termination of letter of award — Whether plaintiff could claim for progress claim — Whether plaintiff's payment of deposits for purchase of two condominiums from defendant was part of consideration of letter of award — Whether deposits for two condominiums ought to be refunded to plaintiff — Whether retention sum ought to be refunded to plaintiff — Whether plaintiff could claim interest on sum adjudged to be paid by defendant to plaintiff — Civil Law Act 1956 s 11 — Contracts Act 1950 ss 2(d), 56(1), (3) & 75 — Construction Industry Payment and Adjudication Act 2012 s 4, 13(c) & 25(n) — Rules of Court 2012 O 42 r 12

Via a letter of award dated 20 March 2017 ('the LA') the defendant had appointed the plaintiff to construct a 'Post-Tensioning Slab System' ('the works') for Phase 1 of the construction of a shopping, cinema and car park complex in Klang, Selangor ('the project'). Aside from the plaintiff, the defendant had also appointed Yit You Construction Sdn Bhd ('YYC') and Semon Bina Sdn Bhd ('SB') as the main builders of the project. As for the consultants for the project, the defendant had appointed the following companies: (a) SA Architects Sdn Bhd ('SAA') as the architect; (b) Jurutera Perunding Primereka Sdn Bhd ('JPP') as the project's Civil and Structural Engineering consultant; and (c) KH Alliance Quantity Surveyors Sdn Bhd ('KHAQS') as the project's quantity surveyor. Pursuant to cl 11 of the LA, the plaintiff had provided a performance bond ('the PB') to the defendant in the sum of RM322,040.47. Further, based on cl 39 of the LA, the plaintiff agreed to purchase two units of condominium from the defendant and to that end, the plaintiff had paid the required deposits amounting to RM100,000 to the

defendant. There was a delay by the plaintiff in the completion of the works allegedly caused by the delay by YYC and SB as well as due to the frequent tower crane breakdown. Consequent upon this delay, the plaintiff had applied from the defendant for three extensions of time ('the plaintiff's three EOT applications') but due to the failure of the plaintiff to submit a revised work program ('the revised work program'), the defendant refused the applications and terminated the LA. In the present case, the plaintiff had claimed for the following relief against the defendant ('the original action'): (i) an injunction to restrain the defendant from making a demand on the PB; and (ii) a sum of RM1,343,777.60 with interest on the sum from 21 August 2020 until full payment of the sum by the defendant. In response, the defendant filed a counterclaim for the following remedies: (A) a declaration that the plaintiff had breached the LA; (B) the plaintiff shall pay to the defendant an amount of RM6,325,522.11 as the liquidated damages ('the LD'); and (C) an order for the court to assess general damages to be paid by the plaintiff to the defendant due to the plaintiff's breach of the LA. The issues arose in the present case were: (1) when did the defendant hand over the project site to the plaintiff; (2) when did the plaintiff's works commence; (3) who had obligation under the LA to provide the revised work program; (4) what was the cause of the delay of the plaintiff's works; (5) whether the defendant should have allowed the plaintiff's three EOT applications; (6) whether the defendant could counterclaim for the LD — this issue discussed the effect of s 75 of the Contracts Act 1950 ('the CA') and s 56(1) and (3) of the CA; (7) whether the defendant's letter dated 17 August 2020 ('the defendant's letter') stating that the completion date was on 15 September 2018 and that no extension of time was given by the defendant to the plaintiff was untrue and lacked good faith; (8) whether the defendant's termination of the LA was valid; (9) whether the plaintiff could rely on s 25(n) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') in support of its submission that the defendant was obliged to pay to the plaintiff for the progress claim ('the PC') Nos 21 to 23 and 26 to 28; (10) whether the defendant breached the LA by non-payment of PC Nos 21 to 23; (11) whether cll 3 and 12 of the LA required the defendant to initiate joint valuation of the plaintiff's works upon the termination of the LA; (12) whether the plaintiff could claim for PC Nos 21 to 23 and 26 to 28; (13) whether the defendant should refund the retention sum to the plaintiff; (14) whether the plaintiff could claim from the defendant for the refund of the deposits for the two condominiums; and (15) whether the plaintiff could claim interest on sums adjudged to be paid by the defendant to the plaintiff.

Held, allowing the original action and dismissing the counterclaim with one set of costs for the original action and the counterclaim in the sum of RM63,520 to be paid by the defendant to the plaintiff:

(1) Based on the evidence, the court found that the possession of the site was only given by the defendant to the plaintiff in May 2018 ('the actual

delivery of site'), as such, the original commencement date, ie, 15 July 2017 as provided in cl 4 of the LA could not apply. Consequently, the defendant could not rely on the original completion date, ie, 15 September 2018 as stipulated in cl 4 of the LA. Further, based on the admission by the defendant's witness (S2) that the defendant only handed over possession of the site to the plaintiff in June 2018, the court found as a fact that the plaintiff's works only begun in June 2018 (see paras 16–18).

(2) A commercially sensible construction of cl 4 meant that upon the actual delivery of the site or within a reasonable time after the actual delivery of the site, the defendant should give the revised work program to the plaintiff. In this regard, the plaintiff was not in any position to provide the revised work program to the defendant because firstly, the plaintiff was only a post-tensioning contractor in the project; and secondly, the plaintiff's works were dependent on the works of YYC and SB. In this case the defendant had not provided the revised work program to the plaintiff as required by cl 4, as such, there was no extended completion date within the meaning of cl 4. In other words, time had become at large in this case (see paras 19–20).

(3) Based on the evidence, the court found that the delay of the plaintiff's works was caused by the following: (a) the defendant's delay in handing over possession of the site to the plaintiff; (b) the substantial delay by YYC and SB with regard to the first stage, third stage and fourth stage of the post-tensioning works; and (c) the frequent tower crane breakdown ('the three causes (work delay)'). In view of the three causes (work delay) which were within the actual knowledge of the defendant's representatives, the defendant should have allowed the plaintiff's three EOT applications and there was no necessity for the plaintiff to submit supporting documents for the plaintiff's three EOT applications to the defendant (see paras 22–24 & 26–27).

(4) As the plaintiff was not guilty of the three causes (work delay), there was therefore no breach of cl 7 or any other clause in the LA by the plaintiff which entitled the defendant to counterclaim for the LD from the plaintiff. Even if it was assumed that the plaintiff had breached cl 7 or any other clause in the LA, the defendant was still not entitled to counterclaim for the LD from the plaintiff by virtue of s 56(1) and (3) of the CA. By virtue of s 56(1) and (3) of the CA, upon the plaintiff's breach of the LA, the LA was voidable at the defendant's option. The defendant however did not exercise this option to terminate the LA within a reasonable time after the plaintiff's breach of the LA, instead, the defendant had affirmed the LA by its conduct, inter alia, by allowing the plaintiff's works to continue at the site until the defendant's termination of the LA. In view of such affirmation, the defendant could not rely on

A cll 6 and 7 of the LA to support the counterclaim. Further, considering that the defendant could not counterclaim for the LD, the defendant should refund the retention sum to the plaintiff (see paras 30, 32 & 46).

(5) Considering that the three causes (work delay) was not attributable to the plaintiff, the content of the defendant's letter regarding the completion date of 15 September 2018 was untrue. Further, the content of the defendant's letter stating that no EOT was given by the defendant was untrue premised upon the court's finding that the plaintiff's three EOT applications should have been allowed by the defendant. The court also found that the defendant's letter had not been sent in good faith for the following reasons: (a) the plaintiff's letter dated 9 July 2020 ('the plaintiff's letter') had requested for the payment for PC Nos 21 to 23, but such payment was not paid by the defendant, instead the defendant's letter was sent as a retaliation to the plaintiff's letter; and (b) in view of the lengthy delay by YYC and SB and the magnitude of the plaintiff's works, a period of three days given in the defendant's letter to remedy the purported plaintiff's defaults was clearly inadequate and proved a lack of bona fides on the defendant's part (see paras 33–34).

(6) The defendant's termination of the LA was issued to the plaintiff pursuant to the defendant's letter which was sent based on cl 37 of the LA. Premised on a strict construction of cl 37 of the LA, it was clear that there was no basis under such clause for the defendant's letter to be sent to the plaintiff, as such, the defendant's termination of the LA had breached cl 37 of the LA ('the first breach') (see para 36).

(7) Section 4 of the CIPAA defined an 'adjudicator' as an individual appointed to adjudicate a dispute under the CIPAA. For the purpose of adjudication proceedings under the CIPAA, s 25(n) of the CIPAA empowered an 'adjudicator' to 'decide or declare on any matter notwithstanding no certificate has been issued' for payment of construction work. This case did not concern adjudication proceedings pursuant to the CIPAA. Consequently, the court could not accept the application of s 25(n) of the CIPAA in this case. More importantly, by virtue of s 13(c) of the CIPAA, every adjudication decision was subject to a court's decision. Hence, s 25(n) of the CIPAA could not be invoked in court proceedings (see para 39).

(8) The court could not accept the defendant's contention that the defendant could not pay for PC Nos 21 to 23 because the supporting documents for the PC had not been verified and signed by the defendant's site representative. If the plaintiff's works did not comply with the requirements of the LA, the defendant's site representative should not only refuse to sign the supporting documents, but the defendant's site representative should also request for the plaintiff to rectify the alleged defects in the plaintiff's works, but in the present case, there was no such

request. There was also no reply or denial by the defendant to the plaintiff's letter requesting the payment for PC Nos 21 to 23 which showed that the defendant's excuse for the non-payment of PC Nos 21 to 23 was a mere afterthought. The defendant's failure to deny the contents of the plaintiff's letter constituted implied admission of the sum owed to the plaintiff. Based on the above evidence and reasons, the defendant had breached the LA by not paying to the plaintiff for PC Nos 21 to 23 ('the second breach') (see para 40).

(9) When the LA had been terminated by the defendant, a commercially sensible interpretation of cll 3 and 12 of the LA required the defendant (not the plaintiff) to initiate a joint valuation of the plaintiff's works. This interpretation was supported by the following practical considerations: (a) as the defendant had possession of the site after the defendant's termination of the LA, only the defendant could initiate such joint valuation; and (b) the defendant (and not the plaintiff) who had appointed SAA, JPP and KHAQS as consultants for the project could have easily instructed them to take part in such joint valuation. Even if the court erred in the interpretation of cll 3 and 12, the court could imply in the LA that the defendant had the contractual obligation to initiate the said joint valuation ('the defendant's implied contractual obligation') considering that both 'Officious Bystander Test' and 'Business Efficacy Test' were satisfied. By reason of the defendant's contractual obligation under cll 3 and 12 of the LA as well as the defendant's implied contractual obligation, the defendant had breached the LA by not initiating a joint valuation of the plaintiff's works after the termination of the LA ('the third breach') (see paras 41–43).

(10) In view of the first breach, the second breach and the third breach, the plaintiff could claim from the defendant for PC Nos 21 to 23 and 26 to 28 ('the PCs'). This finding was premised upon the following reasons: (a) the defendant's site representative and KHAQS could have easily verified the contents of the PCs within a reasonable time after the defendant's receipt of those PCs; (b) in view of the nature of the plaintiff's works, it was not possible for any valuation of the plaintiff's works to be carried out now and if the court did not allow the claim, the defendant would have been unjustly enriched; and (c) if the court did not allow the plaintiff's claim for PC Nos 26 to 28, this meant that the defendant was allowed to exploit the defendant's third breach of the LA at the expense of the plaintiff (see para 44).

(11) The plaintiff's payment of the deposits for the two condominiums to the defendant was part of the 'consideration' for the LA as understood in s 2(d) of the CA. This was because such payment was at the 'desire' of the defendant for the defendant to enter into the LA with the plaintiff and if such payment was not provided by the plaintiff, the defendant would not

have appointed the plaintiff pursuant to the LA. Upon the defendant's termination of the LA and the defendant's failure to counterclaim any LD against the plaintiff, it was only just for the defendant to refund the deposits for the two condominiums to the plaintiff (see paras 47–48).

(12) The court had discretion pursuant to s 11 of the Civil Law Act 1956 to award pre-judgment interest whereas O 42 r 12 of the Rules of Court 2012 provided that the defendant shall pay to the plaintiff post-judgment interest at the rate of 5%pa on the sums adjudged by this court from the date of the oral decision of this case until full payment of the sums. Based on the above provisions, the court ordered as followed: (a) the defendant to pay the plaintiff interest at the rate of 5%pa on the total sum of RM304,477.89 for PC Nos 21 to 23 from 17 July 2020 (ie, after the lapse of seven-day period stated in the plaintiff's letter) until the defendant's full payment of the said total sum; (b) the defendant to pay the plaintiff interest at the rate of 5% pa on the total sum of RM240,308 for PC Nos 26 to 28 from 21 August 2020 (the date when the plaintiff's works stopped) until full settlement of the same by the defendant; and (c) the defendant to pay the plaintiff interest at the rate of 5%pa on the retention sum and the deposits of the two condominiums from 22 August 2020 (ie, the date of the accrual of the plaintiff's cause of action after the unlawful termination of the LA on 21 August 2020) until full payment of these two sums by the defendant (see paras 51–55).

[Bahasa Malaysia summary

Melalui surat tawaran bertarikh 20 Mac 2017 ('LA') defendan telah melantik plaintif untuk membina 'post-tensioning Slab System' ('kerja-kerja tersebut') untuk Fasa 1 pembinaan sebuah kompleks beli-belah, pawagam dan parkir kereta di Klang, Selangor ('projek tersebut'). Selain plaintif, defendan juga telah melantik Yit You Construction Sdn Bhd ('YYC') dan Semon Bina Sdn Bhd ('SB') sebagai pembina utama projek tersebut. Defendan telah melantik syarikat-syarikat berikut sebagai perunding-perunding projek tersebut: (a) SA Architects Sdn Bhd ('SAA') sebagai arkitek; (b) Jurutera Perunding Primereka Sdn Bhd ('JPP') sebagai perunding Kejuruteraan Awam dan Struktur projek; dan (c) KH Alliance Quantity Surveyors Sdn Bhd ('KHAQS') sebagai juruukur bahan projek. Menurut klausa 11 LA, plaintif telah memberikan bon pelaksanaan ('PB') kepada defendan dalam jumlah RM322,040.47. Selanjutnya, berdasarkan klausa 39 LA, plaintif bersetuju untuk membeli dua unit kondominium daripada defendan dan untuk tujuan tersebut, plaintif telah membayar deposit yang diperlukan berjumlah RM100,000 kepada defendan. Terdapat kelewatan oleh plaintif dalam menyiapkan kerja-kerja tersebut yang didakwa disebabkan oleh kelewatan oleh YYC dan SB serta disebabkan oleh kerosakan kren menara yang kerap. Akibat kelewatan ini, plaintif telah memohon daripada defendan untuk tiga lanjutan masa ('tiga permohonan EOT plaintif') tetapi disebabkan kegagalan plaintif

mengemukakan program kerja yang disemak semula ('program kerja yang disemak semula'), defendan menolak permohonan-permohonan tersebut dan menamatkan LA. Dalam kes ini, plaintif telah menuntut relif-relif berikut terhadap defendan ('tindakan asal'): (i) injunksi untuk menghalang defendan daripada membuat tuntutan terhadap PB; dan (ii) sejumlah RM1,343,777.60 dengan faedah ke atas jumlah tersebut mulai 21 Ogos 2020 sehingga pembayaran penuh jumlah tersebut oleh defendan. Sebagai tindak balas, defendan memfailkan tuntutan balas untuk remedi-remedi berikut: (A) pengisytiharan bahawa plaintif telah melanggar LA; (B) plaintif hendaklah membayar kepada defendan sejumlah RM6,325,522.11 sebagai ganti rugi tertentu ('LD'); dan (C) perintah supaya mahkamah menilai ganti rugi am yang perlu dibayar oleh plaintif kepada defendan disebabkan oleh pelanggaran plaintif terhadap LA. Isu-isu yang timbul dalam kes ini ialah: (1) bila defendan menyerahkan tapak projek kepada plaintif; (2) bilakah kerja-kerja plaintif bermula; (3) siapa yang mempunyai kewajipan di bawah LA untuk menyediakan program kerja yang disemak semula; (4) apakah punca kelewatan kerja-kerja plaintif; (5) sama ada defendan sepatutnya membenarkan tiga permohonan EOT plaintif; (6) sama ada defendan boleh membuat tuntutan balas untuk LD — isu ini membincangkan kesan s 75 Akta Kontrak 1950 ('AK') dan s 56(1) dan (3) AK; (7) sama ada surat defendan bertarikh 17 Ogos 2020 ('surat defendan') yang menyatakan bahawa tarikh siap adalah pada 15 September 2018 dan tiada lanjutan masa diberikan oleh defendan kepada plaintif adalah tidak benar dan tidak berniat baik; (8) sama ada penamatan LA oleh defendan adalah sah; (9) sama ada plaintif boleh bergantung pada s 25(n) Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') untuk menyokong penghujahannya bahawa defendan wajib membayar kepada plaintif bagi tuntutan kemajuan kerja ('PC') No 21 hingga 23 dan 26 hingga 28; (10) sama ada defendan melanggar LA dengan tidak membayar PC No 21 hingga 23; (11) sama ada klausa 3 dan 12 LA memerlukan defendan untuk memulakan penilaian bersama kerja plaintif selepas penamatan LA; (12) sama ada plaintif boleh menuntut PC No 21 hingga 23 dan 26 hingga 28; (13) sama ada defendan patut memulangkan wang penahanan kepada plaintif; (14) sama ada plaintif boleh menuntut daripada defendan untuk pembayaran balik deposit bagi kedua-dua kondominium tersebut; dan (15) sama ada plaintif boleh menuntut faedah ke atas jumlah yang diputuskan untuk dibayar oleh defendan kepada plaintif.

Diputuskan, membenarkan tindakan asal dan menolak tuntutan balas dengan satu set kos bagi tindakan asal dan tuntutan balas berjumlah RM63,520 dibayar oleh defendan kepada plaintif:

(1) Berdasarkan keterangan, mahkamah mendapati pemilikan tapak tersebut hanya diberikan oleh defendan kepada plaintif pada Mei 2018 ('pemberian sebenar tapak'), oleh itu, tarikh permulaan kuat kuasa yang asal, iaitu, 15 Julai 2017 seperti yang diperuntukkan dalam klausa 4 LA

tidak terpakai. Akibatnya, defendan tidak boleh bergantung pada tarikh siap yang asal, iaitu, 15 September 2018 seperti yang ditetapkan dalam klausa 4 LA. Selanjutnya, berdasarkan pengakuan saksi defendan (S2) bahawa defendan hanya menyerahkan pemilikan tapak kepada plaintif pada Jun 2018, mahkamah mendapati sebagai fakta bahawa kerja-kerja plaintif hanya bermula pada Jun 2018 (lihat perenggan 16–18).

(2) Tafsiran klausa 4 yang munasabah dari segi komersil bermakna bahawa selepas pemberian sebenar tapak atau dalam masa yang munasabah selepas pemberian sebenar tapak, defendan harus memberikan program kerja yang disemak semula kepada plaintif. Dalam hal ini, plaintif tidak berada dalam apa-apa kedudukan untuk menyediakan program kerja yang disemak semula kepada defendan kerana pertamanya, plaintif hanyalah kontraktor 'post-tensioning' dalam projek tersebut; dan kedua, kerja plaintif bergantung kepada kerja YYC dan SB. Dalam kes ini defendan tidak memberikan program kerja yang disemak semula kepada plaintif seperti yang dikehendaki oleh klausa 4, oleh itu, tiada tarikh penyiapan lanjutan dalam pengertian klausa 4. Dengan kata lain, masa telah menjadi luas dalam kes ini (lihat perenggan 19–20).

(3) Berdasarkan keterangan, mahkamah mendapati bahawa kelewatan kerja-kerja plaintif adalah disebabkan oleh perkara-perkara berikut: (a) kelewatan defendan dalam menyerahkan pemilikan tapak kepada plaintif; (b) kelewatan yang ketara oleh YYC dan SB berkenaan dengan peringkat pertama, peringkat ketiga dan peringkat keempat bagi kerja-kerja 'post-tensioning'; dan (c) kerosakan kren menara yang kerap berlaku ('tiga punca (kelewatan kerja)'). Mengambil kira tiga punca (kelewatan kerja) ini yang berada dalam pengetahuan sebenar wakil defendan, defendan sepatutnya membenarkan tiga permohonan EOT plaintif dan tidak ada keperluan untuk plaintif menyerahkan dokumen sokongan untuk tiga permohonan EOT plaintif kepada defendan (lihat perenggan 22–24 & 26–27).

(4) Memandangkan plaintif tidak bersalah atas tiga punca (kelewatan kerja) tersebut, maka tiada pelanggaran klausa 7 atau mana-mana klausa lain dalam LA oleh plaintif yang memberi hak kepada defendan untuk menuntut balas LD daripada plaintif. Walaupun jika diandaikan bahawa plaintif telah melanggar klausa 7 atau mana-mana klausa lain dalam LA, defendan masih tidak berhak untuk menuntut balas untuk LD daripada plaintif menurut s 56(1) dan (3) AK. Berdasarkan s 56(1) dan (3) AK, apabila plaintif melanggar LA, LA boleh dibatalkan atas pilihan defendan. Defendan bagaimanapun tidak menggunakan pilihan ini untuk menamatkan LA dalam masa yang munasabah selepas pelanggaran plaintif terhadap LA, sebaliknya, defendan telah mengesahkan LA melalui kelakuannya, antara lain, dengan membenarkan kerja plaintif diteruskan di tapak tersebut sehingga

penamatan LA oleh defendan. Disebabkan oleh pengesahan sedemikian, defendan tidak boleh bergantung pada klausa 6 dan 7 LA untuk menyokong tuntutan balas. Selanjutnya, memandangkan defendan tidak boleh membuat tuntutan balas untuk LD, defendan harus membayar balik jumlah penahanan kepada plaintif (lihat perenggan 30, 32 & 46).

(5) Memandangkan tiga punca (kelewatan kerja) tersebut tidak berkaitan dengan plaintif, kandungan surat defendan berhubung tarikh siap pada 15 September 2018 adalah tidak benar. Selanjutnya, kandungan surat defendan yang menyatakan bahawa tiada EOT diberikan oleh defendan adalah tidak benar berdasarkan keputusan mahkamah bahawa tiga permohonan EOT plaintif sepatutnya dibenarkan oleh defendan. Mahkamah juga mendapati surat defendan tidak diberikan dengan suci hati atas sebab-sebab berikut: (a) surat plaintif bertarikh 9 Julai 2020 ('surat plaintif') telah meminta bayaran PC No 21 hingga 23, tetapi bayaran tersebut tidak dibayar oleh defendan, sebaliknya surat defendan dihantar sebagai pembalasan kepada surat plaintif; dan (b) memandangkan kelewatan yang berpanjangan oleh YYC dan SB dan magnitud kerja plaintif, tempoh tiga hari yang diberikan dalam surat defendan untuk meremedi keingkaran plaintif yang didakwa adalah jelas tidak mencukupi dan membuktikan ketiadaan bona fide di pihak defendan (lihat perenggan 33–34).

(6) Penamatan LA oleh defendan telah dinyatakan kepada plaintif menurut surat defendan yang dihantar berdasarkan klausa 37 LA. Berdasarkan tafsiran getas klausa 37 LA, adalah jelas bahawa tiada asas di bawah klausa tersebut untuk surat defendan diserahkan kepada plaintif, oleh itu, penamatan LA tersebut oleh defendan telah melanggar klausa 37 LA ('pelanggaran pertama') (lihat perenggan 36).

(7) Seksyen 4 APAIP mentakrifkan 'adjudikator' sebagai individu yang dilantik untuk mengadjudikasi suatu pertikaian di bawah APAIP. Bagi tujuan prosiding adjudikasi di bawah APAIP, s 25(n) APAIP memberi kuasa kepada 'adjudikator' untuk 'memutuskan atau mengisytiharkan apa-apa perkara walaupun tiada perakuan dikeluarkan' untuk pembayaran kerja pembinaan. Kes ini tidak melibatkan prosiding adjudikasi menurut APAIP. Akibatnya, mahkamah tidak dapat menerima pemakaian s 25(n) APAIP dalam kes ini. Lebih penting lagi, menurut s 13(c) APAIP, setiap keputusan adjudikasi adalah tertakluk kepada keputusan mahkamah. Oleh itu, s 25(n) APAIP tidak boleh digunakan dalam prosiding mahkamah (lihat perenggan 39).

(8) Mahkamah tidak dapat menerima hujahan defendan bahawa defendan tidak boleh membayar PC No 21 hingga 23 kerana dokumen sokongan PC tersebut belum disahkan dan ditandatangani oleh wakil tapak defendan. Sekiranya kerja plaintif tidak mematuhi kehendak LA, wakil

tapak defendan bukan sahaja harus menolak untuk menandatangani dokumen sokongan, tetapi wakil tapak defendan juga harus meminta plaintif untuk membetulkan kecacatan yang didakwa dalam kerja plaintif, tetapi dalam kes ini, tiada permintaan sedemikian dibuat. Juga tiada jawapan atau penafian oleh defendan terhadap surat plaintif yang meminta pembayaran PC No 21 hingga 23 yang menunjukkan alasan defendan untuk tidak membayar PC No 21 hingga 23 adalah pemikiran terkemudian semata-mata. Kegagalan defendan untuk menafikan kandungan surat plaintif merupakan pengakuan tersirat jumlah terhutang kepada plaintif. Berdasarkan keterangan dan alasan di atas, defendan telah melanggar LA dengan tidak membayar kepada plaintif PC No 21 hingga 23 ('pelanggaran kedua') (lihat perenggan 40).

(9) Apabila LA telah ditamatkan oleh defendan, tafsiran komersil yang munasabah bagi klausa 3 dan 12 LA memerlukan defendan (bukan plaintif) untuk memulakan penilaian bersama hasil kerja plaintif. Tafsiran ini disokong oleh pertimbangan praktikal berikut: (a) memandangkan defendan mempunyai milikan tapak tersebut selepas defendan menamatkan LA, hanya defendan boleh memulakan penilaian bersama tersebut; dan (b) defendan (dan bukan plaintif) yang telah melantik SAA, JPP dan KHAQS sebagai perunding untuk projek tersebut boleh dengan mudah mengarahkan mereka untuk mengambil bahagian dalam penilaian bersama tersebut. Andai kata mahkamah terkhilaf dalam tafsiran klausa 3 dan 12, mahkamah boleh mengandaikan secara tersirat dalam LA bahawa defendan mempunyai kewajipan kontrak untuk memulakan penilaian bersama tersebut ('obligasi kontrak tersirat defendan') memandangkan kedua-dua 'Officious Bystander Test' dan 'Business Efficacy Test' telah dipenuhi. Disebabkan oleh obligasi kontrak defendan di bawah klausa 3 dan 12 LA serta obligasi kontrak tersirat defendan, defendan telah melanggar LA dengan tidak memulakan penilaian bersama kerja plaintif selepas penamatan LA ('pelanggaran ketiga') (lihat perenggan 41–43).

(10) Disebabkan oleh pelanggaran pertama, pelanggaran kedua dan pelanggaran ketiga tersebut, plaintif boleh menuntut daripada defendan untuk PC No 21 hingga 23 dan 26 hingga 28 ('PC tersebut'). Penemuan ini didasarkan atas sebab-sebab berikut: (a) wakil tapak defendan dan KHAQS boleh dengan mudah mengesahkan kandungan PC tersebut dalam masa yang munasabah selepas defendan menerima PC tersebut; (b) mengambil kira sifat kerja plaintif, adalah tidak mungkin untuk apa-apa penilaian kerja plaintif dijalankan sekarang dan jika mahkamah tidak membenarkan tuntutan tersebut, defendan akan diperkaya secara tidak adil; dan (c) jika mahkamah tidak membenarkan tuntutan plaintif untuk PC No 26 hingga 28, ini bermakna defendan dibenarkan untuk mengeksploitasi pelanggaran ketiga defendan terhadap LA tersebut dengan kemudaratan terhadap plaintif (lihat perenggan 44).

(11) Pembayaran oleh plaintif bagi deposit untuk dua kondominium tersebut kepada defendan adalah sebahagian daripada 'pertimbangan' untuk LA tersebut seperti yang difahami dalam s 2(d) AK. Ini adalah kerana bayaran tersebut adalah atas 'keinginan' defendan untuk defendan memasuki LA bersama plaintif dan jika bayaran tersebut tidak diberikan oleh plaintif, defendan tidak akan melantik plaintif melalui LA tersebut. Selepas penamatan LA tersebut oleh defendan dan setelah defendan gagal untuk menuntut balas apa-apa LD terhadap plaintif, adalah adil untuk defendan membayar balik deposit untuk kedua-dua kondominium tersebut kepada plaintif (lihat perenggan 47–48).

(12) Mahkamah mempunyai budi bicara menurut s 11 Akta Undang-Undang Sivil 1956 untuk mengawardkan faedah pra-penghakiman manakala A 42 k 12 Kaedah-Kaedah Mahkamah 2012 menyatakan bahawa defendan hendaklah membayar kepada plaintif faedah selepas penghakiman pada kadar 5% setahun atas jumlah wang yang dihakimi oleh mahkamah ini dari tarikh keputusan lisan kes ini sehingga pembayaran penuh jumlah tersebut. Berdasarkan peruntukan-peruntukan di atas, mahkamah memerintahkan seperti berikut: (a) defendan membayar faedah kepada plaintif pada kadar 5% setahun ke atas jumlah keseluruhan RM304,477.89 untuk PC No 21 hingga 23 mulai 17 Julai 2020 (iaitu, selepas luput tempoh tujuh hari yang dinyatakan dalam surat plaintif) sehingga defendan membayar penuh jumlah wang tersebut; (b) defendan membayar faedah kepada plaintif pada kadar 5% setahun ke atas jumlah keseluruhan RM240,308 untuk PC No 26 hingga 28 mulai 21 Ogos 2020 (tarikh apabila kerja plaintif berhenti) sehingga penyelesaian penuh jumlah tersebut oleh defendan; dan (c) defendan membayar faedah kepada plaintif pada kadar 5% setahun ke atas jumlah penahanan dan deposit kedua-dua kondominium tersebut mulai 22 Ogos 2020 (iaitu, tarikh akruan kausa tindakan plaintif selepas penamatan LA yang menyalahi undang-undang pada 21 Ogos 2020) sehingga pembayaran penuh kedua-dua jumlah ini oleh defendan (lihat perenggan 51–55).]

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors [2021] 2 MLJ 374, FC (refd)

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15; [2019] 2 CLJ 723, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109, FC (refd)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489, CA (folld)

Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd

& Anor [2012] 3 MLJ 422, CA (folld)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

Legislation referred to

Civil Law Act 1956 s 11
Construction Industry Payment and Adjudication Act 2012 ss 2(d), 4, 13(c), 25(n)
Contracts Act 1950 ss 56, 56(1), (3), 75
Evidence Act 1950 s 8(2)
Rules of Court 2012 O 42 r 12

Mahendran a/l Raman (M Raman & Assoc) for the plaintiff.
Julian Chan Tjun Leung (with Nur Izzati bt Mohd Shaiful Bahri) (Julian Stephanie) for the defendant.

Wong Kian Kheong J:

A. INTRODUCTION

[1] By way of a 'letter of award' dated 20 March 2017 ('LA'), the defendant company ('defendant') appointed the plaintiff company ('plaintiff') to construct a 'post-tensioning Slab System' ('works') for Phase 1 of the construction of a shopping, cinema and car park complex in Klang, Selangor Darul Ehsan ('project').

[2] This case raises a novel question of whether the plaintiff can claim from the defendant for the return of RM100,000 ('deposits (two condominiums)') which has been paid by the plaintiff to the defendant as deposits for the plaintiff's purchase of two units of residential condominiums in 'Maple Residences' (developed by the defendant) ('two condominiums'). The payment of the deposits (two condominiums) had been provided in cl 39 LA ('cl 39').

B. BACKGROUND

[3] The LA provided as follows, among others:

(1) cl 3 LA ('cl 3') stated that, among others, the price for the works was RM6,440,809.44 ('contract sum') and if the LA was terminated, the plaintiff

'shall be paid for the works carried out up to the date of termination less whatever payments made earlier';

(2) according to cl 4 LA ('cl 4'), among others:

(a) the commencement date of the works was 15 July 2017 ('original commencement date') while the completion date of the works was 15 September 2018 ('original completion date');

(b) if date of delivery of possession of site of the project ('site') was deferred by the defendant 'for any reason', the original commencement date 'shall be revised to other date as instructed' by the defendant and the original completion date 'shall be adjusted accordingly'; and

(c) if the progress of the works was delayed beyond 10% from the 'approved work program', the defendant shall have the right to:

(i) determine the employment of the plaintiff and employ third party to complete the works and/or do repair works ('third party's works');

(ii) deduct and/or set off the cost of third party's works ('cost (third party's works)') from any money due from the defendant to the plaintiff; and

(iii) recover cost (third party's works) from the plaintiff as a debt.

(3) cl 6 LA ('cl 6') provided that wherever time was mentioned in the LA, time shall be the essence of the LA;

(4) cl 7 LA ('cl 7') stated that if the plaintiff failed to complete the works by the original completion date or 'agreed extended completion date' ('extended completion date') and upon the issuance of letter and/or notice by the architect and/or Superintending Officer for the non-completion of works, the defendant shall be entitled to, among others, claim from the plaintiff liquidated damages ('LD') at the rate of RM10,000 per day or part thereof;

(5) cl 8 LA ('cl 8') provided as follows, among others:

(a) the plaintiff was required to submit within 14 days from the date of the LA, a 'detailed work program' ('work program') for the defendant's approval;

(b) the work program shall take into consideration the defendant's 'master work program' and shall indicate a 'series of critical dates for the completion' of the works;

A (c) the work program may be revised from time to time upon the written approval of the defendant's 'Representative' and the work program cannot be amended without such a written approval;

(d) the plaintiff shall monitor the progress of the works 'diligently and
B precisely';

(e) the plaintiff shall update the work program every fortnightly and at any time as and when instructed by the 'Architect/Engineer/[defendant]';

(f) if the works fall behind the critical dates in the work program or if it is the
C opinion of the architect/engineer that the plaintiff cannot complete the works 'as per the contractual completion date', the architect/engineer reserves the right to instruct the plaintiff to accelerate the works ('accelerated works');

D (g) cost of accelerated works shall be borne by the plaintiff; and

(h) the work program shall not form part of the LA but shall be used by the defendant as a basis for evaluating any application for extension of time ('EOT') submitted by the plaintiff.

E

(6) cl 11 LA required the plaintiff to provide to the defendant a performance bond of a sum of RM322,040.47 in the form of a banker's guarantee within 14 days from the date of the LA ('PB'). The PB was to ensure the plaintiff's due performance of the LA. The plaintiff had provided the PB to the defendant;

F

(7) according cl 12 LA ('cl 12'), among others:

(a) the plaintiff was required to submit progress claim ('PC') with photographs and supporting documents not later than 28th day of each
G month;

(b) upon receipt of the 'complete' PC, a joint site evaluation shall be conducted;

(c) an 'interim payment certificate' ('IPC') shall be issued within 14 days
H from the date of receipt of PC;

(d) there is a period of 30 days from the date of IPC for the IPC to be honoured;

(e) each interim progress payment shall be subject to a retention sum of 5%
I up to a maximum 5% of the contract sum or revised contract sum, whichever is higher ('retention sum');

(f) the retention sum shall be released upon the issuance of the 'certificate of practical completion'; and

(g) if the LA is terminated, the plaintiff shall be paid for the works carried out up to the date of termination less whatever payments made earlier.

(8) paras (a) to (g) of cl 37 LA ('cl 37') provided the grounds ('plaintiff's defaults') for the defendant to terminate the plaintiff's appointment under the LA by way of the defendant's written notice to the plaintiff to remedy the plaintiff's default(s) within a time period to be determined by the defendant; and

(9) cl 39 stated as follows, among others:

(a) the plaintiff had agreed to purchase the two condominiums;

(b) prior to the plaintiff's acceptance of the LA, the plaintiff shall make a booking for the purchase of the two condominiums with Khoo Soon Lee Realty Sales and Marketing Department by paying the deposits (two condominiums);

(c) the deposits (two condominiums) shall be refunded to the plaintiff after the signing of the sale and purchase agreements ('two SPAs') and after the plaintiff had made all necessary payments regarding the purchase of the two condominiums; and

(d) if the plaintiff fails to execute the two SPAs, the defendant reserves the right to 'recover/deduct' the purchase price of the two condominiums from any money due from the defendant to the plaintiff.

[4] The defendant had appointed the following consultants for the project:

(1) SA Architects Sdn Bhd ('SAA') was the architect for the project;

(2) the project's civil and structural engineering consultant was Jurutera Perunding Primereka Sdn Bhd ('JPP'); and

(3) KH Alliance Quantity Surveyors Sdn Bhd ('KHAQS') was the project's quantity surveyor ('QS').

C. LEGAL PROCEEDINGS

[5] In this suit, the plaintiff has claimed for, among others, the following relief against the defendant ('original action'):

(1) an injunction to restrain the defendant from making a demand on the PB; and

(2) a sum of RM1,343,777.60 with interest on the sum from 21 August 2020 until full payment of the sum by the defendant to the plaintiff.

[6] The defendant had resisted the original action and counterclaimed for, among others, the following remedies against the plaintiff ('counterclaim'):

(1) a declaration that the plaintiff had breached the LA;

(2) the plaintiff shall pay to the defendant an amount of RM6,325,522.11 as LD; and

(3) an order for the court to assess general damages to be paid by the plaintiff to the defendant as a result of the plaintiff's breach of the LA.

[7] Both the plaintiff and defendant had consented to a joint trial of the original action and counterclaim ('trial').

C(1). The plaintiff's case

[8] At the trial, the following two witnesses gave evidence for the plaintiff:

(1) Mr Lim Chin Beng ('SP1'), a director of the plaintiff; and

(2) Mr Francis Maurice van Weiringen ('SP2'), the plaintiff's general manager.

[9] According to SP1 and SP2, among others:

(1) the plaintiff's 'post-tensioning' works ('plaintiff's works') has three parts, namely:

(a) installation of post-tensioning components ('first part (plaintiff's works)'), ie 'anchorage', 'bursting reinforcement', 'galvanized iron ducts' and 'prestressed concrete steel strand' ('PC strands');

(b) 'stressing' of PC strands is a process of applying tension force to the PC strands as stated in the design of the project in question ('second part (plaintiff's works)'); and

(c) 'tendon grouting', ie, a process to protect PC strands in the galvanized iron duct from erosion ('third part (plaintiff's works)').

(2) for the project, there were two 'main builders' as follows:

(a) Yit You Construction Sdn Bhd ('YYC') had been appointed by the defendant for works in Zone A of the project; and

(b) Semon Bina Sdn Bhd ('SB') was the main builder for the project's Zone B.

(3) there are six consecutive stages for the plaintiff' to complete post-tensioning works, namely:

(a) the first stage consists of installation of supporting props, formwork and bottom reinforcement ('first stage (post-tensioning works)'). With regard to the first stage (post-tensioning works):

(i) the first stage (post-tensioning works) had to be performed by YYC and SB;

(ii) the first stage (post-tensioning works) did not concern the plaintiff; and

(iii) until YYC and SB had completed the first stage (post-tensioning works), the second stage of post-tensioning works ('second stage (post-tensioning works)') could not commence.

(b) the second stage (post-tensioning works) concerned the first part (plaintiff's works), namely the plaintiff's installation of post-tensioning components;

(c) in the third stage, YYC and SB had to install top reinforcements in accordance with the project's design ('third stage (post-tensioning works)'). The third stage (post-tensioning works) only involved YYC and SB;

(d) upon completion of the third stage (post-tensioning works), YYC and SB would cast the floor with concrete ('fourth stage (post-tensioning works)'). The plaintiff was not involved in the fourth stage (post-tensioning works);

(e) in the fifth stage ('fifth stage (post-tensioning works)'):

(1) YYC and SB would test the strength of the floor cast with concrete;

(2) if the floor cast with concrete achieved the strength required by the design of the project, YYC and SB would remove the 'concrete side forms'; and

(3) the second part (plaintiff's works) would commence.

(f) the sixth stage ('sixth stage (post-tensioning works)') constituted the third part (plaintiff's works).

(4) the plaintiff's works was delayed ('delay (plaintiff's works)') due to the following reasons:

(a) there were substantial delays by YYC and SB with regard to the first stage (post-tensioning works), third stage (post-tensioning works) and fourth stage (post-tensioning works) ('delay (YYC and SB)'). Hence, the plaintiff's works could only commence in June 2018;

(b) the defendant had delayed in handing over possession of the site to the plaintiff. According to SP1, possession of the site was only given by the defendant to the plaintiff in May 2018;

(c) the defendant had terminated the appointment of SB at the end of December 2019 but there was no replacement of SB by the defendant;

(d) the defendant had replaced YYC with Meng Kai Construction ('MKC') in early 2020; and

(e) the plaintiff's works required a tower crane and the plaintiff's works were adversely affected by frequent breakdowns of the tower crane ('frequent tower crane breakdowns').

(5) due to the delay (plaintiff's works), the plaintiff had to apply from the defendant for three EOTs to complete the plaintiff's works ('plaintiff's three EOT applications');

(6) in respect of payment for the plaintiff's works:

(a) the plaintiff had submitted to the defendant a total of 28 PCs ('from PC No 1 (May 2018) to PC No 28 (August 2020)');

(b) the defendant had only paid to the plaintiff a total sum of RM4,537,134.15 for PC Nos 1 to 20 ('defendant's part payments'); and

(c) the plaintiff sent a letter dated 9 July 2020 to the defendant ('plaintiff's letter (9 July 2020)') which requested for the defendant's payment for PC Nos 21 to 23 (totaling RM304,477.89).

(7) by a letter dated 17 August 2020 from the defendant to the plaintiff ('defendant's letter (17 August 2020)'), the defendant stated as follows, among others:

(a) according to the LA, the completion date was 15 September 2018;

(b) with regard to the plaintiff's works, no EOT was given by the defendant to the plaintiff. Hence, the plaintiff had failed to complete the plaintiff's works on time;

(c) by reason of the plaintiff's 'lackadaisical and cavalier attitude displayed in the performance' of the plaintiff's works, the defendant invoked cl 37 and required the plaintiff to complete the plaintiff's works and hand over the site to the defendant within three days from the plaintiff's receipt of the defendant's letter (17 August 2019); and

(d) upon the plaintiff's failure to complete the plaintiff's works and to hand over the site to the defendant within three days from the plaintiff's receipt of the defendant's letter (17 August 2019), the defendant shall terminate the LA and commence legal proceedings against the plaintiff for 'all antecedent breaches' of the LA by the plaintiff.

(8) the defendant sent a letter dated 21 August 2020 to the plaintiff which terminated the LA ('defendant's termination (LA)'); and

(9) until the defendant's termination (LA), the plaintiff had performed 90% of the works but the defendant had not paid to the plaintiff for PC Nos 21 to 23 and 26 to 28 (which totaled RM687,309.53).

C(2). Case for the defendant

[10] The defendant had called three witnesses to give evidence at the trial, namely:

(1) Ms Siw Wan Sam ('SD1'), the defendant's senior contract manager;

(2) Mr Lim Ji Hong ('SD2'), the project manager for the defendant; and

(3) Sr Lim Keng Heng ('SD3'), a chartered QS who is KHAQS's managing director.

[11] According to SD1, among others:

(1) the defendant did not pay PC Nos 21 to 23 because the plaintiff did not submit to KHAQC supporting documents for PC Nos 21 to 23;

(2) there was delay (plaintiff's works) which led to the defendant's termination (LA);

(3) the plaintiff had applied for an EOT to SAA and JPP but such an application could not be 'processed' due to the plaintiff's failure to provide supporting documents for the EOT application; and

(4) the plaintiff was liable to pay LD to the defendant as a result of the delay (plaintiff's works).

[12] SD2 testified as follows, among others:

(1) in answer to question No 13 of SD2's witness statement, SD2 admitted that the defendant only handed over possession of the site to the plaintiff in June 2018 ('SD2's admission');

(2) notwithstanding SD2's admission, the plaintiff was required by the LA to complete the works on 15 September 2018; and

(3) the defendant could not accept the plaintiff's applications for EOT due to the following reasons, among others:

   (a) the plaintiff did not submit 'full documentation', in particular a revised work program ('revised work program'), to enable the plaintiff's EOT applications to be processed; and

   (b) the delay (plaintiff's works) was caused by the plaintiff's lack of manpower to perform the plaintiff's works.

[13] SD3 testified that, among others, PC Nos 21 to 23 were not supported by grouting reports, stressing records and 'Joint Measurement Sheets' (collectively referred to in this judgment as 'supporting documents (PC)') which had been verified and signed by JPP and the defendant's representative at the site ('defendant's site representative').

D. ISSUES

[14] The following questions arise in this case:

(1) with regard to the delay (plaintiff's works):

(a) when was possession of the site given by the defendant to the plaintiff?

(b) when did the plaintiff's works commence?

(c) who had the obligation under the LA to provide the revised work program?

(d) whether the delay (plaintiff's works) was caused by:

(i) the delay (YYC and SB); and/or

(ii) frequent tower crane breakdowns.

(e) whether the defendant should have allowed the plaintiff's three EOT applications. In this respect, can the defendant rely on the fact that the plaintiff's three EOT applications were not supported by relevant documents ('supporting documents (plaintiff's three EOT applications)'); and

(f) can the defendant counterclaim from the plaintiff for LD? This issue discusses the effect of:

(i) s 75 of the Contracts Act 1950 ('the CA'); and

(ii) s 56(1) and (3) of the CA.

(2) whether the defendant had breached the LA when:

(a) the defendant's termination ('LA') was made contrary to cl 37; and

(b) the defendant failed to pay to the plaintiff for PC Nos 21 to 23 and 26 to 28. In this regard:

(i) can the plaintiff rely on s 25(n) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to support the plaintiff's claim for payment regarding the plaintiff's works?

(ii) whether the defendant can refuse to pay PC Nos 21 to 23 on the ground that the defendant's site representative did not verify and

sign the supporting documents (PC); and

(iii) upon the defendant's termination ('LA'), whether the defendant was required by cll 3 and 12 to initiate a valuation of the plaintiff's works together with the plaintiff within a reasonable time after the defendant's termination (LA) ('joint valuation (plaintiff's works)'). Alternatively, can the court imply in the LA that the defendant had the contractual obligation to initiate a joint valuation (plaintiff's works)?

(4) whether the defendant can refuse to return the retention sum to the plaintiff; and

(5) can the plaintiff claim from the defendant for a refund of the deposits (two condominiums)?

E. HOW SHOULD COURT CONSTRUE LA?

[15] The LA is a commercial contract which should be interpreted by the court in a commercially sensible manner. I cite the following two Federal Court judgments:

(1) the decision of Gopal Sri Ram FCJ in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, at [10]; and

(2) the judgment of Zainun Ali FCJ in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464, at [78].

F. DELAY (PLAINTIFF'S WORKS)

F(1). When did defendant hand over site to plaintiff?

[16] I make a finding of fact that possession of the site was only given by the defendant to the plaintiff in May 2018 ('actual delivery of site (May 2018)'). This factual finding is based on SP1's evidence. Furthermore, according to SD2's admission, the defendant only handed over possession of the site to the plaintiff in June 2018.

[17] In view of the actual delivery of site (May 2018):

(1) the original commencement date (15 July 2017) as provided in cl 4 cannot apply;

(2) the defendant cannot rely on the original completion date (15 September 2018) as stipulated in cl 4; and

(3) the questions that arise now are as follows:

(a) whether the defendant had 'instructed' the plaintiff regarding the extended commencement date within the meaning of cl 4. In other words, did the defendant provide the revised work program to the plaintiff? and

(b) what was/were the cause(s) of the delay (plaintiff's works)?

F(2). When did plaintiff's works commence?

[18] This court finds as a fact that the plaintiff's works only begun in June 2018. This finding of fact is based on the following evidence and reasons:

(1) para 12 of the statement of claim ('SOC') had pleaded that the plaintiff's works begun in June 2018. Paragraph 12 SOC had not been denied by the defendant in sub-paras 11.1 to 11.5 of the defence and counterclaim;

(2) SP1 had testified that the plaintiff's works commenced in June 2018. The court accepts this testimony in light of the actual delivery of site (May 2018) — please refer to the above para 16; and

(3) according to SD2's admission, the defendant only handed over possession of the site to the plaintiff in June 2018.

F(3). Who had obligation under LA to provide revised work program?

[19] A commercially sensible construction of cl 4 means that upon the actual delivery of site (May 2018) or within a reasonable time after the actual delivery of site (May 2018), the defendant should give the revised work program to the plaintiff. This commercially sensible interpretation of cl 4 is due to the following reasons:

(1) cl 4 has expressly provided that if the date of delivery of the site was deferred by the defendant 'for any reason', the original commencement date 'shall be revised to other date as instructed' by the defendant (not the plaintiff); and

(2) the plaintiff was not in any position to provide the revised work program to the defendant because:

(a) the plaintiff was only a post-tensioning contractor in the project; and

(b) as explained in the above sub-paras 9(1) to (3), the plaintiff's works were dependent on the works of YYC and SB.

[20] In this case the defendant had not provided the revised work program to the plaintiff as required by cl 4 and I so find as a fact. Accordingly, there was no extended completion date within the meaning of cl 4. In other words, time has become at large in this case.

[21] I have not overlooked cl 8. Clause 8 only required the plaintiff to submit the original work program to the defendant within 14 days from the date of the LA. It is thus clear that the defendant cannot rely on cl 8 to contend that the plaintiff has the obligation to provide the revised work program to the defendant.

F(4). What was/were cause(s) of delay (plaintiff's works)?

[22] As explained in the above para 16, the first cause of the delay (plaintiff's works) was the defendant's delay in handing over possession of the site to the plaintiff ('first cause (work delay)').

[23] The following evidence and reasons support the court's factual finding that the second cause of the delay (plaintiff's works) was the delay (YYC and SB) ('second actual delivery of site)'):

(1) there were 'technical meetings' ('TM') held in the defendant's office regarding the progress of the project. TMs were attended by, among others, representatives of the plaintiff, defendant, SAA, JPP, YYC and SB.

The minutes of TM No 29 held on 5 June 2018 stated as follows, among others:

(a) there was a delay of 150 days in the works of YYC (para 3.6); and

(b) SB was guilty of 147 days' delay with regard to SB's works (para 3.7).

(2) according to the minutes of TM No 32 held on 26 June 2018, among others:

(a) the delay in YYC's works had increased to 182 days (para 3.6); and

(b) the delay in SB's works had increased to 181 days (para 3.7).

(3) the minutes of TM No 35 held on 17 July 2018 stated as follows, among others:

(a) the delay in YYC's works had increased to 190 days (para 3.4); and

(b) there was still a delay of 181 days on the part of SB (para 3.5).

(4) according to the minutes of TM No 36 held on 24 July 2018, among others:

(a) the delay in YYC's works had increased to 215 days (para 3.4); and

(b) the delay in SB's works had increased to 212 days (para 3.5).

(5) the minutes of TM No 39 held on 14 August 2018 stated as follows, among others:

(a) the delay in YYC's works had increased to 241 days; and

(b) the delay in SB's works had increased to 239 days.

(6) the minutes of TM No 46 held on 2 October 2018 stated, among others, that both YYC and SB had each been guilty of delay of 240 days regarding their works;

(7) according to the minutes of TM No 99 held on 15 October 2019, among others:

(a) the delay in YYC's works had increased to 294 days (para 2.1); and

(b) the delay in SB's works had increased to 241 days (para 3.1).

(8) the minutes of TM No 100 held on 22 October 2019 stated as follows, among others:

(a) the delay in YYC's works had been reduced to 291 days (para 2.1); and

(b) the delay in SB's works had increased to 254 days (para 3.1).

(9) according to of the minutes of TM No 104 held on 26 November 2019, among others:

(a) YYC has stopped work at the site since 15 November 2019 (para 2.1); and

(b) SB was still guilty of delay of 254 days regarding SB's works (para 3.1).

(10) the minutes of TM No 124 held on 23 June 2020 stated as follows, among others:

(a) MKC commenced work at the site on 21 May 2020 (para 2.0); and

(b) SB had stopped work at the site and a new main builder had not been appointed by the defendant (para 3.0).

(11) this court attaches weight to the above minutes of TMs regarding delay (YYC and SB) ('TM minutes (delay by YYC and SB)') because:

(a) the TM minutes (delay by YYC and SB) constituted contemporaneous documentary evidence;

(b) the defendant had prepared TM minutes (delay by YYC and SB);

(c) the defendant did not correct, let alone deny, the accuracy of TM minutes (delay by YYC and SB);

(d) at the trial, the defendant did not call any witness from the defendant, SAA, JPP, KHAQS, YYC and/or SB to rebut the truth of the contents of TM minutes (delay by YYC and SB);

(e) in view of the delay (YYC and SB), the appointments of YYC and SB as the defendant's main builders had been subsequently terminated by the defendant. Such a conduct of the defendant is relevant under s 8(2) of the Evidence Act 1950 ('the EA'). Section 8(2) provides as follows:

> *The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto*, and the conduct of any person an offence against whom is the subject of any proceeding, *is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.* (Emphasis added.)

(f) the defendant's appointment of MKC to replace YYC and SB as the project's main builders, is relevant according to s 8(2) of the EA and proves the delay (YYC and SB).

(12) without the completion of works of YYC and SB, the plaintiff's works could not commence, let alone be completed — please refer to the above sub-paras 9(1) to (3). Accordingly, the delay (plaintiff's works) was not caused by the plaintiff but by the delay (YYC and SB).

[24] I find as a fact that there was a third cause of the delay (plaintiff's works), ie, the frequent tower crane breakdowns ('third actual delivery of site)'). This finding of fact is premised on the defendant's own record which showed a total of 42 days that the tower crane at the project had broken down ('defendant's record (frequent tower crane breakdowns)'). The defendant's record (frequent tower crane breakdowns) included the dates and reasons for frequent tower crane breakdowns.

[25] I note that the defendant's record (frequent tower crane breakdowns) had stated that 'Total Man Delay' by the plaintiff. This court cannot accept the truth of this statement in the defendant's record (frequent tower crane breakdowns) because firstly, the tower crane was not erected at the site by the plaintiff. Nor was the tower crane operated and maintained at the site by the plaintiff. Lastly, the plaintiff merely requested for the use of the tower crane to hoist materials for the purpose of the plaintiff's works.

F(5). Whether defendant should have allowed plaintiff's three EOT applications

[26] In view of the first actual delivery of site), second actual delivery of site) and third actual delivery of site) (referred collectively in this judgment as the 'three causes (work delay') (please refer to the above paras 22–24), the defendant should have allowed the plaintiff's three EOT applications.

[27] This court finds as a fact that the defendant's excuse that no supporting documents (plaintiff's three EOT applications) had been forwarded by the plaintiff in support of the plaintiff's three EOT applications, had been contrived by the defendant to defeat unlawfully the original action in this case. This factual finding is due to the fact that the defendant's representatives had actual knowledge of the three causes (work delay. In other words, due to the three causes (work delay), there was no necessity for the plaintiff to submit supporting documents (plaintiff's three EOT applications) to the defendant.

F(6). Can defendant counterclaim from plaintiff for LD?

[28] I reproduce below s 75 of the CA:

> *s 75 Compensation for breach of contract where penalty stipulated for*
>
> *When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach*, or if the contract contains any other stipulation by way of penalty, *the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named* or, as the case may be, the penalty stipulated for. (Emphasis added.)

[29] In the Federal Court case of *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723, at [74](g), Richard Malanjum CJ (Sabah and Sarawak) (as he then was) has decided that a contracting party may rely on a penalty clause in an agreement against the opposing party (X) if there is a breach of the agreement by X.

[30] As explained in the above paras 22 to 24, the plaintiff was not guilty of the three causes (work delay. There was therefore no breach of cl 7 or any other clause in the LA by the plaintiff which entitled the defendant to counterclaim for LD from the plaintiff in this case — please refer to *Cubic Electronics*. On this ground alone, the counterclaim should be dismissed with costs.

[31] There is a second reason why this court cannot allow the counterclaim in this case. Section 56 of the CA provides as follows:

> *S 56 Effect of failure to perform at fixed time, in contract in which time is essential.*
>
> (1) *When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable*

at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of failure when time is not essential.

(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

Effect of acceptance of performance at time other than that agreed upon.

(3) *If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so*. (Emphasis added.)

[32] Even if it is assumed that the plaintiff had breached cl 7 or any other clause in the LA ('plaintiff's breach (LA)'), the defendant is still not entitled to counterclaim for LD from the plaintiff by virtue of s 56(1) and (3) of the CA. My reasons are as follows:

(1) upon the plaintiff's breach (LA), by virtue of s 56(1) CA, the LA was voidable at the defendant's option. The defendant however did not exercise this option to terminate the LA within a reasonable time after the plaintiff's breach (LA). Instead, the defendant had affirmed the LA ('defendant's affirmation (LA)') by the following conduct of the defendant:

(a) the defendant had allowed the plaintiff's works to continue at the site until the defendant's termination (LA);

(b) the defendant's part payments (RM4,537,134.15) had been made. The total amount of the defendant's part payments was not insignificant. Furthermore, the defendant did not allege that the defendant's part payments had been erroneously made. In fact, the defendant did not even counterclaim from the plaintiff for the return of the defendant's part payments;

(c) the defendant failed to give the revised work program to the plaintiff — please refer to the above para 20;

(d) the defendant's conduct as stated in the above sub-paras (a) to (c) is relevant under s 8(2) of the EA and

(e) the following two Federal Court cases explain the effect of the defendant's affirmation (LA):

(i) in *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151, at 153, Salleh Abas FJ (as he then was) has decided as follows:

Time being of the essence:

... In this case as time was provided to be of the essence of the agreement, the stipulated periods within which these four houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfil this condition would entitle the respondent to have an option of treating the agreement either: (a) as having been repudiated and dismissing the appellant; or (b) as still continuing. (See 9 *Halsbury's Laws of England* (4th Ed) para 538, p 370).

In this case obviously he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing. (Emphasis added.)

(ii) Gopal Sri Ram FCJ delivered the following judgment in *Berjaya Times Squares*, at [45]:

[45] *There is alternative ground for holding that time is not of the essence. It is this. The respondent, though it had the right to put an end to the contract when the appellant failed to deliver the unit within the stipulated time, did not do so. Instead, it continued making payments and negotiating for delivery. The respondent's conduct certainly points to the conclusion that even if time was of the essence when the contract was made (speaking advisedly) it ceased to be of the essence. There are many authorities on the subject. But I find it sufficient to merely refer to the judgment of Raja Azlan Shah J (as His Royal Highness then was) in Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 *where he said*:

Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid (*Webb v Hughes* (1870) LR 10, *at p 286; Stickney v Keeble & Anor* [1915] AC 386, *at p 423). If the defendants had on the very day of 30 November 1966 ie the original date for completion, made their stand, their decision would have been that time was of the essence and it would have been proper for them to give notice on the day fixed for completion that they would abandon the contract; but after going on negotiating they should have given a reasonable notice (Tilley v Thomas* (1867) LR 3; Ch App 61) ... (Emphasis added.)

(b) in view of the defendant's affirmation (LA), the defendant cannot rely on cll 6 and 7 to support the counterclaim in this case.

G. THE DEFENDANT'S LETTER (17 AUGUST 2020) WAS UNTRUE AND LACKED GOOD FAITH

[33] It is this court's finding of fact that the following contents of the defendant's letter (17 August 2020) were not true:

(1) the defendant's letter (17 August 2020) stated that according to the LA, the completion date was 15 September 2018. As explained in the above paras 22 to 24, in view of the three causes (work delay) which could not be attributed to the plaintiff, the defendant could not rely on the completion date of 15 September 2018. In other words, the content of the defendant's letter (17 August 2020) regarding the completion date of 15 September 2018 was not true; and

(2) according to the defendant's letter (17 August 2020), no EOT was given by the defendant to the plaintiff. This content of the defendant's letter (17 August 2020) was spurious because the plaintiff's three EOT applications should have been allowed by the defendant — please refer to the above para 26.

[34] I am of the view that the defendant's letter (17 August 2020) had not been sent in good faith by the defendant to the plaintiff. This decision is premised on the following evidence and reasons:

(1) the plaintiff's letter (9 July 2020) had requested for the defendant's payment for PC Nos 21 to 23. The defendant did not pay for PC Nos 21 to 23. Instead, the defendant's letter (9 July 2020) was sent as a 'retaliation' to the plaintiff's letter (9 July 2020); and

(2) the defendant's letter (17 August 2020) gave the plaintiff only three days to remedy the purported plaintiff's defaults. In view of the lengthy delay (YYC and SB) and the magnitude of the plaintiff's works, a period of three days given in the defendant's letter (17 August 2020) was clearly inadequate and proved a lack of bona fides on the defendant's part.

H. WAS DEFENDANT'S TERMINATION (LA) VALID?

[35] According to the Federal Court case of *Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors* [2021] 2 MLJ 374, the court should construe strictly a contractual provision (which provides for a party's (Y) right to terminate the contract) against Y. It is decided by Hasnah Hashim FCJ in *Catajaya*, at [2], [63], [64] and [66], as follows:

> [2] *On 9 May 2019 this court granted leave in respect of these two questions*:
>
> *Question 1: Whether the law in Malaysia should be that termination clauses ought to be construed strictly* ...

A ...

[63] Reading the terms of the SSA in its entirety, we find that there is no latent ambiguity; the obligations of the parties are specifically defined. *Termination is not permitted unless as expressly stipulated under SSA. Notice must be given to the appellant to rectify the identified breach and take steps to rectify that breach within the prescribed time as agreed. There must be strict adherence to the clauses in an agreement which relates to termination*.

B

[64] *Termination of an agreement results in the end of the parties obligations. Reading the provisions of ss 11 and 12 of the SSA the party in breach must be notified of the identified reason for termination as well as be given the opportunity to rectify the breach. The Federal Court in SPM Membrane emphasised the importance of giving effect to the specific requirements of a termination clause, failing which a notice of termination would be defective*: ...

C

...

D

[66] *For the reasons adverted to above, we take the view that termination clause in an agreement ought to be construed strictly. In light of the foregoing, the first question must be answered in the positive*. (Emphasis added.)

E **[36]** I am of the view that the defendant's termination (LA) had breached cl 37 ('defendant's first breach (LA)') as follows:

(1) the defendant's termination (LA) was issued to the plaintiff pursuant to the defendant's letter (17 August 2020). The defendant's letter (17 August 2020) was sent to the plaintiff based on cl 37.

F There were no plaintiff's defaults within a literal meaning of cl 37(a) to (g) for the defendant's letter (17 August 2020) to be sent to the plaintiff;

(2) premised on a strict construction of cl 37 (please refer to *Catajaya*), it is clear to this court that there was no basis under cl 37 for the defendant's letter (17 August 2020) to be sent to the plaintiff; and

G

(3) if the defendant had no valid ground under cl 37(a) to (g) to issue the defendant's letter (17 August 2020), the defendant's termination (LA) had breached cl 37.

H I. CAN PLAINTIFF RELY ON S 25(n) OF THE CIPAA?

[37] The plaintiff's learned counsel has cited s 25(n) of the CIPAA to support the contention that the defendant was obliged to pay to the plaintiff for PC Nos 21 to 23 and 26 to 28.

I

[38] I reproduce below s 25(n) CIPAA:

s 25 *Powers of the adjudicator*

The adjudicator shall have the powers to:

...

(n) *decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter* ... (Emphasis added.)

[39] Section 4 of the CIPAA defines an 'adjudicator' as an individual appointed to adjudicate a dispute under CIPAA. For the purpose of adjudication proceedings under CIPAA, s 25(n) of the CIPAA empowers an 'adjudicator' to 'decide or declare on any matter notwithstanding no certificate has been issued' for payment of construction work. This case does not concern adjudication proceedings pursuant to CIPAA. Consequently, I cannot accept the application of s 25(n) of the CIPAA in this case. More importantly, by virtue of s 13(c) of the CIPAA, every adjudication decision is subject to a court's decision. Hence, s 25(n) of the CIPAA cannot be invoked in court proceedings.

J. DID DEFENDANT BREACH LA BY NON-PAYMENT OF PC NOS 21 TO 23?

[40] I am not able to accept the defendant's contention that the defendant could not pay for PC Nos 21 to 23 because the supporting documents (PC) had not been verified and signed by the defendant's site representative ('defendant's excuse (non-payment of PC Nos 21 to 23)'). The following reasons support this factual decision:

(1) if the plaintiff's works did not comply with the requirements of the LA and/or if the plaintiff's works were defective ('alleged defects (plaintiff's works)'), the defendant's site representative should not only refuse to sign the supporting documents ('PC') but the defendant's site representative should also request for the plaintiff to rectify the alleged defects (plaintiff's works). However, at all material times:

   (a) the defendant's site representative did not state that the plaintiff's works up to the extent of PC Nos 21 to 23, did not comply with LA; and

   (b) the defendant's site representative did not request the plaintiff to remedy the alleged defects (plaintiff's works).

(2) the plaintiff's letter (9 July 2020) had requested for the defendant's payment for PC Nos 21 to 23. If the defendant's excuse (non-payment of PC Nos 21 to 23) was true, the defendant would have replied to the plaintiff's letter (9 July 2020) and relied on the defendant's excuse (non-payment of PC Nos 21 to 23) as a ground for the defendant's refusal to pay for PC Nos 21 to 23. However, there was no reply, let alone a denial, by the defendant to the plaintiff's letter (9 July 2020). It is thus

clear that the defendant's excuse (non-payment of PC Nos 21 to 23) is a mere afterthought to stifle unlawfully the plaintiff's claim for PC Nos 21 to 23; and

(3) the defendant's failure to deny the contents of the plaintiff's letter (9 July 2020) is most telling. The following two appellate decisions have decided that in a commercial transaction, there is an implied admission that a party (Z) owes a sum of money if Z does not deny a letter requesting for Z to repay that sum:

(a) in the Court of Appeal case of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at pp 288–289; [1995] 4 CLJ 155 at 159, Gopal Sri Ram JCA (as he then was) has decided as follows:

> *During argument, we registered our surprise at the learned judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.*
>
> *In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in Tan Cheng Hock v Chan Thean Soo* [1987] 2 MLJ 479, 487:
>
> *In Wiedemann v Walpole* [1891] 2 QB 534, *537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher MR, in his judgment, remarked*
>
> *Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise'. Earlier, in his judgment, he said, 'Now there are cases — business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.* (Emphasis added.)

(b) *Wong Hon Leong David* has been approved in the following judgment of Azahar Mohamed FCJ (as he then was) in the Federal Court case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, at [62]:

> [62] ... *It is the ordinary nature of businessman to immediately refute any proposition injurious to him contained in letters and not to let it stands (see Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155). (Emphasis added.)

Premised on the above evidence and reasons, I have no hesitation to decide that the defendant had breached the LA by not paying to the plaintiff for PC Nos 21 to 23 ('defendant's second breach (LA)').

K. DID CLL 3 AND 12 REQUIRE DEFENDANT TO INITIATE JOINT VALUATION (PLAINTIFF'S WORKS)?

[41] According to cll 3 and 12, upon the defendant's termination (LA), the plaintiff shall be entitled to be paid by the defendant for the plaintiff's works up to the termination of the LA. I am of the opinion that when the LA had been terminated by the defendant, a commercially sensible interpretation of cll 3 and 12 required the defendant (not the plaintiff) to initiate a joint valuation (plaintiff's works). Such a commercially sensible construction of cll 3 and 12 is supported by the following practical considerations:

(1) in view of the defendant's termination (LA), the plaintiff had returned possession of the site to the defendant. Hence, the plaintiff had no access to the site and could not initiate any joint valuation (plaintiff's works). As the defendant had possession of the site after the defendant's termination (LA), only the defendant could initiate a joint valuation (plaintiff's works); and

(2) the defendant who had appointed SAA, JPP and KHAQS as consultants for the project, could have easily instructed SAA, JPP and KHAQS to take part in a joint valuation (plaintiff's works). The plaintiff was not in any position to ask for the participation of SAA, JPP and KHAQS in a joint valuation (plaintiff's works).

[42] Even if I have erred in the above interpretation of cll 3 and 12, the court can imply in the LA that the defendant (not the plaintiff) had the contractual obligation to initiate a joint valuation (plaintiff's works) ('defendant's implied contractual obligation (joint valuation of plaintiff's works)'). My reasons are as follows:

(1) according to the judgment of Peh Swee Chin FCJ in the Federal Court case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, at 169–170, the court can imply a contractual term if the following two tests ('two tests') are fulfilled cumulatively:

   (a) if an 'officious bystander' is asked regarding the defendant's implied contractual obligation (joint valuation of plaintiff's works), what would be the answer of the officious bystander ('officious bystander test')? and

   (b) is it necessary to give business efficacy to the LA for the court to imply the defendant's implied contractual obligation (joint valuation of plaintiff's works) ('business efficacy test')?

(2) an application of the two tests is as follows:

(a) if an 'officious bystander' is asked regarding the defendant's implied contractual obligation (joint valuation of plaintiff's works), the officious bystander would have answered in the affirmative. Hence, the invocation of the officious bystander test favours the implication of the defendant's implied contractual obligation (joint valuation of plaintiff's works) in the LA; and

(b) the business efficacy test is satisfied in this case because it is necessary to give business efficacy to the LA for the court to imply the defendant's implied contractual obligation (joint valuation of plaintiff's works).

[43] By reason of:

(1) the defendant's contractual obligation under cll 3 and 12 (please refer to the above para 41); or

(2) the defendant's implied contractual obligation (joint valuation of plaintiff's works) (please refer to the above para 42),

the defendant had breached the LA by not initiating a joint valuation of plaintiff's works after the defendant's termination (LA) ('defendant's third breach (LA)').

L. CAN PLAINTIFF CLAIM FOR PC NOS 21 TO 23 AND 26 TO 28?

[44] In view of the defendant's first breach (LA), defendant's second breach (LA) and defendant's third breach (LA) (collectively referred to in this judgment as the 'defendant's three breaches (LA)'), the question that arises is whether the plaintiff can claim from the defendant for PC Nos 21 to 23 and 26 to 28. This issue must be answered 'yes' due to the following reasons:

(1) PC Nos 21 to 23 and 26 to 28 had been submitted by the plaintiff to the defendant. The defendant's site representative and KHAQS could have easily verified the contents of PC Nos 21 to 23 and 26 to 28 within a reasonable time after the defendant's receipt of those PCs;

(2) in view of the nature of the plaintiff's works (please refer to the above sub-paras 9(1) to 9(3)), it is not possible for any valuation of the plaintiff's works to be carried out now. In other words, it is unjust to the plaintiff if the court does not allow the plaintiff's claim for PC Nos 21 to 23 and 26 to 28. In fact, if the court dismisses the plaintiff's claim for PC Nos 21 to 23 and 26 to 28, this will unjustly enrich the defendant with regard to the plaintiff's works which formed the subject matter of PC Nos 21 to 23 and 26 to 28; and

(3) as explained in the above paras 41 to 43, the defendant's third breach (LA) was committed when the defendant failed to initiate a joint valuation of plaintiff's works. If the court does not allow the plaintiff's claim for PC Nos 26 to 28, this means that the defendant is allowed to exploit the defendant's third breach (LA) at the expense of the plaintiff. I rely on the following judgment of the Court of Appeal delivered by Gopal Sri Ram JCA (as he then was) in *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489, at 492:

> Quite apart from the construction of para 1(3)(b) of the First Schedule, *there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage if his own breach. See Alghussein Establishment v Eton College* [1988] 1 WLR 587, *New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1.
>
> *But as I have said, the principle is of universal application*. (Emphasis added.)

M. SHOULD DEFENDANT REFUND RETENTION SUM TO PLAINTIFF?

[45] In *Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor* [2012] 3 MLJ 422, at [17], Zainun Ali JCA (as she then was) has delivered the following judgment in the Court of Appeal:

> [17] *The retention monies are monies already earned by the respondents (as contractor) for the works already done under the contract. These monies are part of the progress payments claimed and certified for payment to the respondents (as contractor) under cl 22 of the contract concerned* ... (Emphasis added.)

[46] In this case, the defendant cannot counterclaim for LD from the plaintiff (please refer to the above Part F(6)). Accordingly, premised on *Qimonda Malaysia*, the defendant should refund the retention sum (RM318,000) to the plaintiff in this case.

N. CAN PLAINTIFF CLAIM FROM DEFENDANT FOR REFUND OF DEPOSITS (TWO CONDOMINIUMS)?

[47] I am of the view that the plaintiff's payment of the deposits (two condominiums) to the defendant was part of the 'consideration' for the LA as understood in s 2(d) of the CA. This opinion is premised on the following reasons:

(1) our s 2(d) CA has defined 'consideration' as follows:

> s 2 Interpretation

A *In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context*:

...

(d) *when, at the desire of the promisor, the promisee or any other person has done*
B *or abstained from doing, or does or abstains from doing, or promises to do or abstains from doing, something, such act or abstinence or promise is called a consideration for the promise;* (Emphasis added.)

(2) the plaintiff's payment of the deposits (two condominiums) to the
C defendant was part of the 'consideration' for the LA within the meaning in s 2(d) of the CA because:

(a) the plaintiff's payment of the deposits (two condominiums) to the defendant was at the 'desire' of the defendant for the defendant to enter into the LA with the plaintiff; and

D (b) if the plaintiff did not provide the deposits (two condominiums) to the defendant, the defendant would not have appointed the plaintiff pursuant to the LA.

E **[48]** Upon the defendant's termination (LA) and the defendant's failure to counterclaim any LD against the plaintiff, it is only just for the defendant to refund the deposits (two condominiums) to the plaintiff.

O. OUTCOME OF ORIGINAL ACTION AND COUNTERCLAIM

F **[49]** As explained in the above Parts F(1) to F(5), G, H and J to N, I have no hesitation to allow the original action. The counterclaim is dismissed — please refer to the above Part F(6).

P. CAN PLAINTIFF CLAIM INTEREST ON SUMS ADJUDGED TO BE
G PAID BY DEFENDANT TO PLAINTIFF?

[50] Section 11 of the CLA and O 42 r 12 of the RC provide as follows:

s 11 *Power of Courts to award interest on debts and damages*

H *In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:*

I Provided that nothing in this section —

(a) shall authorize the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

O 42 r 12 RC *Interest on judgment debts*

Subject to rule 12A, except when it has been otherwise agreed between the parties, *every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied*. (Emphasis added.)

[51] It is not disputed that the court has a discretion under s 11 of the CLA to award pre-judgment interest on any judgment sum 'at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period ... between the date when the cause of action arose and the date of judgment' — please refer to the judgment of Raja Azlan Shah FJ (as His Majesty then was) in the Federal Court case of *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109, at 120.

[52] By virtue of O 42 r 12 of the RC, the defendant shall pay to the plaintiff post-judgment interest at the rate of 5%pa on the sums adjudged by this court from the date of the oral decision of this case until full payment of these sums.

[53] With regard to the total sum of RM304,477.89, the subject matter of PC Nos 21 to 23 ('total sum (PC Nos 21 to 23)'), the plaintiff's letter (9 July 2020) gave the defendant seven days from the date of the plaintiff's letter (9 July 2020) to pay the total sum (PC Nos 21 to 23). This court therefore exercises its discretion under s 11 of the CLA and O 42 r 12 of the RC to order the defendant to pay to the plaintiff interest at the rate of 5%pa) on the total sum (PC Nos 21 to 23) from 17 July 2020)after the lapse of seven-day period stated in the plaintiff's letter (9 July 2020)] until the defendant's full payment of the total sum (PC Nos 21 to 23).

[54] The total amount claimed in PC Nos 26 to 28 is RM240,308 (total sum (PC Nos 26 to 28)). The plaintiff's works stopped on 21 August 2020, ie, the date when the defendant terminated the LA. Accordingly, I exercise my discretion pursuant to s 11 of the CLA and O 42 r 12 of the RC to order the defendant to pay to the plaintiff interest at the rate of 5%pa on the total sum (PC Nos 26 to 28) from 21 August 2020 until full settlement of the same by the defendant.

[55] As for the retention sum and deposits (two condominiums), the plaintiff's cause of action for breach of LA accrued on 22 August 2020 after the unlawful termination of the LA by the defendant on 21 August 2020. Consequently, this court exercises its discretion under s 11 of the CLA and O 42 r 12 of the RC to order the defendant to pay to the plaintiff interest at the

rate of 5%pa on the retention sum and deposits (two condominiums) from 22 August 2020 until full payment of these two sums by the defendant.

Q. COURT'S DECISION

[56] Premised on the above evidence and reasons, this court adjudges as follows:

(1) the original action is allowed with the following orders:

(a) the defendant shall pay the total sum (PC Nos 21 to 23) to the plaintiff with interest as stated in the above para 53;

(b) the defendant shall pay the total sum (PC Nos 26 to 28) to the plaintiff with interest as decided in the above para 54; and

(c) the defendant shall refund to the plaintiff the retention sum and plaintiff's deposits (two condominiums) with interest as explained in the above para 55;

(2) the counterclaim is dismissed; and

(3) one set of costs for the original action and counterclaim (because the original action and counterclaim are tried together) in a sum of RM63,520 (determined by the court based on the plaintiff's bill of costs) shall be paid by the defendant to the plaintiff.

Original action allowed; counterclaim dismissed with one set of costs for original action and counterclaim in the sum of RM63,520 to be paid by defendant to plaintiff.

Reported by Dzulqarnain Ab Fatar